

HENGEL ASSOCIATES, P.C.

CONTRACT NO. V579C-1205

VABCA- 4680

VA MEDICAL CENTER  
HOT SPRINGS, SOUTH DAKOTA

**Raymond J. Hengel**, Hengel Associates, P.C., Rapid City, South Dakota, for the Appellant.

**James Petersen, Esq.**, Trial Attorney, and **Phillipa L. Anderson, Esq.**, Acting Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

### ORDER DISMISSING APPEAL

1. The Board, in its August 3, 1995 ORDER TO SHOW CAUSE, noted that, from the documents before it, the appeal appeared to be untimely. Correspondence received by the Board indicated that the Contractor received the Final Decision on April 27, 1995. However, the Notice of Appeal, which was faxed to the Contracting Officer, appears to bear a fax transmission date of July 27, 1995, or ninety-one (91) days after the receipt of the Final Decision. The Contract Disputes Act (CDA), 41 U.S.C. § 601 et seq., provides in §606 that:

Within *ninety days* from the date of receipt of a contracting officer's final decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.  
[emphasis supplied]

The time limitation on the filing of an appeal, as a statutory waiver of sovereign immunity, must be strictly construed. Thus, the Board is without discretion to assume jurisdiction over an appeal not filed within ninety days. ***Cosmic Construction Co. v. United States***, 697 F.2d 1389 (Fed. Cir. 1982); ***Olympus Corporation***, VABCA No. 3550, 92-2 BCA ¶ 24,856; ***Surgical Appliance Industries, Inc.***, VABCA No. 3674, 93-1 BCA ¶ 25,364. It should be noted, however, that a contractor may appeal to the Court of Federal Claims within one year of receipt of a final decision.

2. We granted the Appellant until August 21, 1995, to SHOW CAUSE why this appeal should not be dismissed for lack of jurisdiction, because the claim was not appealed to the Board in a timely manner as required by the CDA. The Appellant requested, and was granted, an extension until August 28, 1995, but did not reply until August 30, 1995. In its reply the Appellant alleged that his appeal was timely, stating that the Notification of Termination "was received in our office by April 27, 1995. A letter notifying our intent to appeal the termination was written on July 26, 1995 . . . and was sent by fax on July 27, 1995 to Ms. Joann Walker, Contract Specialist." While the Appellant did fax the Notice of Appeal three months after receiving the Final Decision, that three month period was ninety-one (91) days long.

3. Given the facts before the Board, we conclude that we are without jurisdiction to consider the matter. Accordingly, the appeal of Hengel Associates, P.C., VABCA4680, is hereby dismissed pursuant to Board Rule 5.

**IT IS SO ORDERED**

DATE: **August 31, 1995**

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GUY H. MCMICHAEL III  
Chief Administrative Judge  
Panel Chairman

We concur:

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MORRIS PULLARA, JR.  
Administrative Judge

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RICHARD W. KREMPASKY  
Administrative Judge